

General Information Letter: A corporation created under Illinois law is not protected from Illinois income tax by Public Law 86-272.

October 18, 2000

Dear:

This is in response to your letter dated October 9, 2000, in which you request a letter ruling. The nature of your letter and the information provided require that we respond with a General Information Letter (GIL). A GIL is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 86 Ill. Adm. Code 1200.120(b) and (c), which may be viewed on our website at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

Your letter states as follows:

We are writing on behalf of our client, xxxxxxxxxxxxxxxx, in reply to the Illinois Department of Revenue's notice dated September 14, 2000. Copy is enclosed.

It is our understanding that the Illinois statutes are written in such a way that "doing business" for taxation nexus, requires that some physical presence or business activity generating an economic benefit within the state is enough to require a business to file income tax returns. In light of this understanding, xxxxxxxxxxxxxxxx filed a State of Illinois corporation income tax return (IL-1120) for FYE 09/1998.

Here are the facts and circumstances regarding our client's business. xxxxxxxxxxxxxxxx is incorporated in the State of Illinois. Our client has only one physical location, which is located at xxxxxxxxxxxxxxxxxxxxxxxx, xxxxxxxxxxxxxxxx, Michigan. xxx does not have operations, inventory, or assets within the State of Illinois. xxx does have one employee residing within the State of Illinois. The resident employee only performs solicitation activities within the State of Illinois. The sales orders are sent to our client's location in Michigan for verification and approval. Then the ordered products are shipped, from Michigan, to customers via third-party common carrier.

Based on the protection of immune activities stated in Public Law 86-272, we now believe that xxx does not have taxation nexus in the State of Illinois. Accordingly, please let this letter serve as our request to void our State of Illinois IL-1120 tax return filed for FYE 09/1998, refund our tax payment, and abate the assessed interest and penalty.

## **RULING**

The determination of whether a taxpayer has nexus with Illinois is extremely fact-specific. Therefore, the Department does not issue rulings regarding whether a taxpayer has nexus with the State. Such a determination can only be made in the context of an audit where a Department auditor has access to all relevant facts and information. However, we can provide general information regarding nexus with the State.

The Due Process and Commerce Clauses of the United States Constitution limit the power of states to tax foreign corporations. The Due Process Clause requires some minimum connection between a state and the person, property, or transaction it seeks to tax (Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904 (1992)). The Commerce Clause requires that the state's tax only be applied to an activity having a substantial nexus with the state (Id.). Unless protected by Public Law 86-272 (15

U.S.C.A. 381), where any part of a foreign corporation's income is allocable to Illinois in accordance with the provisions of Article 3 of the Illinois Income Tax Act ("the IITA"; 35 ILCS 5/301-304, 308), Illinois can demonstrate the connection or nexus necessary to subject such corporation to tax.

IITA section 304(a)(2)(A) states:

The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the taxable year by the person for compensation, and the denominator of which is the total compensation paid everywhere during the taxable year.

Subparagraph (B) of this section adds that compensation is considered paid in Illinois where the individual's service is performed entirely within this State.

Your letter indicates that an employee of xxx "only performs solicitation activities within the State of Illinois." Accordingly, a portion of xxxxx income would be allocable to Illinois in accordance with the provisions of Article 3 of the IITA. xxx may therefore be subject to Illinois income tax unless it is protected by Public Law 86-272.

15 U.S.C.A. §381(a) provides:

No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

- (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
- (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

However, subsection (b) of section 381 states:

The provisions of subsection (a) of this section shall *not* apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to ... *any corporation which is incorporated under the laws of such State.* (Emphasis added)

You letter states that xxx is incorporated in Illinois. Therefore, it is not protected in Illinois by Public Law 86-272. Accordingly, xxx may be subject to Illinois income tax.

As stated above, this is a GIL. Accordingly, it does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding upon the Department. If you are not under audit and wish to obtain a binding private letter ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of 86 Ill. Adm. Code 1200.110(b).

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If you have further questions concerning this GIL you may contact Legal Services at (217) 782-7055. If you have further questions related to the Illinois income tax laws, visit our website at [www.revenue.state.il.us](http://www.revenue.state.il.us) or contact the Department's Taxpayer information Division at (217) 782-3336.

Sincerely,

Brian L. Stocker  
Staff Attorney (Income Tax)